Supreme Court, U.S.
FILED

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NO. _____

in the

Supreme Court of the United States

October Term, 1994

DARREN SCOTT CROSS,
Petitioner,

v.

JOHN JABE,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

KENNETH A. WEBB (P 22066)
Attorney for Petitioner
3155 W. Big Beaver Rd., Ste. 206
Troy, Michigan 48084
(810) 643-0730

QUESTION PRESENTED FOR REVIEW

WHETHER, WHERE THE TRIAL COURT, DURING THE JURY CHARGE, BARS ANYONE FROM ENTERING OR LEAVING THE COURTROOM, STATING DISTRACTION OF THE JURY AS THE REASON; WHERE THE TRIAL COURT DOES NOT ASK COUNSEL TO SPEAK ON THE ORDER'S SUBJECT; WHERE DEFENSE COUNSEL DOES NOT OBJECT; WHETHER THE CLOSURE ORDER VIOLATES PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A PUBLIC TRIAL?

Petitioner responds "Yes."

Respondent responds "No."

The Courts Below respond "No."

LIST OF PARTIES

The only parties to the proceedings in the United States Court of Appeals for the Sixth Circuit were Petitioner Darren Scott Cross and Respondent John Jabe.

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THE LOWER COURTS ERRED IN DENYING PETITIONER'S APPLICATION FOR HABEAS CORPUS, BECAUSE THE TRIAL COURT DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A PUBLIC TRIAL. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI TO APPLY AND INTERPRET ITS WALLER V. GEORGIA DECISION ON THE ABOVE RIGHT AND TO REMOVE SOME UNCERTAINTY ON ITS APPLICATION TO COURTROOM CLOSURES DURING THE JURY CHARGE.

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DECISION BELOW

On December 8, 1994, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the United States District Court for the Eastern District of Michigan in an unpublished Order, docket number 94-1075.

STATEMENT OF JURISDICTION

Based on the above United States Court of Appeals decision, this Court has jurisdiction over this appeal under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) The United States Constitution, Sixth Amendment, reading in relevant part as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." (Our emphasis).

2) The United States Constitution, Fourteenth Amendment, reading in relevant part as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Our emphasis).

STATEMENT OF THE CASE

Procedural History

1. On February 24, 1987, a Detroit Recorder's Court jury, before the Honorable Vera Massey Jones, convicted

Petitioner Darren Scott Cross (Petitioner Cross) of felony murder. (Trial Transcript [Trial Tr.], Vol. VII, p. 153)

2. On March 11, 1987, Judge Jones sentenced Petitioner Cross to life imprisonment in solitary confinement at hard labor. Judge Jones credited him with 184 days served in the Wayne County Jail. (Sentencing Transcript, p. 6)

3. On May 17, 1989, the Michigan Court of Appeals affirmed his conviction. (R. 25: Order)

4. On August 8, 1989, the Michigan Court of Appeals denied his motion for rehearing. (R. 25: Order)

5. On February 26, 1990, the Michigan Supreme Court denied his application for leave to appeal. (R. 25: Order)

6. On March 22, 1991, the Detroit Recorders Court, Judge Jones, denied his motion to set the judgment aside. (R. 22: Order)

7. On July 8, 1991, the Michigan Court of Appeals denied his application for leave to appeal the denial of his above motion "for lack of merit in the grounds presented. Judge Kelly would remand to the trial court to comply with MCR 6.508(E)." (R. 22: Order)

8. On or about January 31, 1992 the Michigan Supreme Court denied his application for leave to appeal the above Michigan Court of Appeals decision "because we are not persuaded that the questions presented should be reviewed by this Court." (R. 23: Order)

9. On or about December 22, 1992, Petitioner Cross petitioned the United States District Court for the Eastern District of Michigan under 28 U.S.C. Sec. 2254 for a writ of habeas corpus. (R. 1: Petition for Writ of Habeas Corpus)

10. On January 13, 1994, the District Court, the Honorable Barbara K. Hackett,

denied the petition. (R. 30: Memorandum Opinion and Order; R. 31: Judgment)

11. On January 24, 1994, Petitioner Cross appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit (R. 32: Notice of Appeal).

12. On February 3, 1994, the District Court, the Honorable Barbara K. Hackett, certified probable cause. (R. 35: Order)

13. On December 8, 1994, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's decision without opinion. (Appendix A)

Substantive Facts

After presentation of all the evidence and completion of closing arguments, Judge Jones ordered from the bench as follows:

> "To the persons who are in the audience, once I start instructing this jury no

> one will be permitted to go out of this courtroom nor, to the officer who is at the door, is anyone to be admitted. People moving around will be too distracting and will not permit me to give the instructions as I should. So, if there are any persons who are in the audience who feel that they will not be able to sit inside the courtroom for the next 30 to 40 minutes it is now your opportunity to leave."

(Trial Tr., Vol. VI, p. 81 [Sixth Circuit Joint Appendix, p. 509])

Neither party objected to this order. The trial court did not ask counsel to speak before closing the courtroom. The trial court did not hold any hearing or consider any less drastic alternatives on the record. (Trial Tr., Vol. VI, p. 81 [Sixth Circuit Joint Appendix, p. 509])

REASONS FOR GRANTING THE WRIT

THE LOWER COURTS ERRED IN DENYING PETITIONER'S APPLICATION FOR HABEAS CORPUS, BECAUSE THE TRIAL COURT DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A PUBLIC TRIAL. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI TO APPLY AND INTERPRET ITS WALLER V. GEORGIA DECISION ON THE ABOVE RIGHT AND TO REMOVE SOME UNCERTAINTY ON ITS APPLICATION TO COURTROOM CLOSURES DURING THE JURY CHARGE.

A criminal defendant has a constitutional right to a public trial. U.S.Const.Am.VI.

This right applies to the states under the Fourteenth Amendment's Due Process Clause. Duncan v. Louisiana, 391 U.S. 145, 148; 88 S.Ct. 1444; 20 L.Ed.2d 491 (1968)

The seminal case on the Sixth Amendment right to a public trial is Waller v. Georgia, 467 U.S. 39; 104 S.Ct. 2210; 81 L.Ed. 2d 31 (1984). There, the Court described the reasons why this right

is crucial for a fair trial:

> "The central aim of a criminal proceeding must be to try the accused fairly, and '[o]ur cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.'"

Id. at 46, quoting Gannett Co. v. DePasquale, 443 U.S. 368, 380; 99 S.Ct. 2898; 61 L.Ed.2d 608 (1979).

> "'"The requirement of a public trial is for the benefit of the accused; that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions...."'"

Waller, 467 U.S. 39, 46, quoting Gannett, 443 U.S. 368, 380, quoting In Re Oliver, 333 U.S. 257, 270, n.25, 68 S.Ct. 499, 92 L.Ed. 682 (1948) (further citation omitted). Accord, Estes v. Texas, 381 U.S. 582, 588, 85 S.Ct. 1628, 14 L.Ed.2d 543

(1965)(Harlan, J., concurring).

> "'The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.'"

Waller, 467 U.S. 39, 46 n.4, quoting Oliver, 333 U.S. 257, 270.

Although the defendant's right to a public trial is not absolute and may have to yield "to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information, [s]uch circumstances will be rare...." Waller, 467 U.S. 39, 45.

Recognizing a strong "'presumption of openness,'" the Waller Court rejected any per se rule, permitting trial courts, absent proper discretion, to close the courtroom. Instead, the Waller Court adopted a stringent test for overcoming this strong presumption against such

closures:

1. The trial court must find that closure is essential to preserve higher interests or values.

2. The trial court must narrowly tailor the closure to serve those interests or values.

3. The trial court must express these interests or values on the record.

4. The trial court must make findings to support a closure order, and the findings must be specific enough to permit meaningful appellate review.

Id. at 45, citing Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 510; 104 S.Ct. 819; 78 L.Ed.2d 629 (1984).

Some circuits have developed a slightly less stringent formulation of the Waller Court's overriding interest requirement for partial closures, as opposed to total closures, of pretrial or

trial proceedings. E.g., Nieto v. Sullivan, 879 F.2d 743, 753 (10th Cir. 1989) (adopting "substantial reason" standard for a partial closure), United States v. Sherlock, 962 F.2d 1349, 1357 (1992)(same), Douglas v. Wainwright (Douglas I), 714 F.2d 1532, 1542 (11th Cir. 1983), vacated and remanded on other grounds 468 U.S. 1206, 104 S.Ct. 3475, 82 L.Ed.2d 874 (1984), affirmed 739 F.2d 531 (11th Cir. 1984)(Douglas II)(same).

Federal courts have consistently held that a criminal defendant need not show any specific prejudice to obtain relief from a trial court order violating his/her right to a public trial. E.g., Waller, 467 U.S. 39, 49, Douglas I, 714 F.2d 1532, 1542, Vidal v. Williams, 31 F.3d 67, 69 (2d Cir. 1994).

The reasons include the following: A requirement to show prejudice "'would in most cases deprive [the defendant] of the

[public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury.'" Waller, 467 U.S. 39, 49 n.9, quoting United States ex rel. Bennett v. Rundle, 419 F.2d 599, 608 (1969)(en banc).

This Court has rejected harmless error analysis for public trial violations. Waller, 467 U.S. 39, 49 n.9, quoting with approval People v. Jones, 47 N.Y.2d 409, 416, 391 N.E.2d 1335 (1979) ("'The harmless error rule is no way to gauge the great, though intangible societal loss that flows from closing courthouse doors.'").

Over a hundred years ago, the Michigan Supreme Court recognized the inherent prejudice in a violation of a defendant's right to a public trial and the inherent injury to our society:

> "'I cannot accede to the correctness of the proposition intimated in that case that, if a public

> trial has not been accorded to the accused, the burden is upon him to show that actual injury has been suffered by a deprivation of his constitutional right. On the contrary when he shows that his constitutional right has been violated, the law conclusively presumes that he has suffered an actual injury. I go further, and say that the whole body politic suffers an actual injury when a constitutional safeguard erected to protect the rights of citizens has been violated in the person of the humblest or meanest citizen of the State. The Constitution does not stop to inquire of what the person has been accused or what crime he has perpetrated; but it accords to all, without question, a fair, impartial, and public trial.'"

People v. Medcoff, 344 Mich. 108, 118, 73 N.W.2d 537 (1955), quoting with approval People v. Murray, 89 Mich. 276, 290, 50 N.W. 995 (1891) (Our emphasis).

The federal courts' rejection of any specific prejudice requirement or harmless error analysis results from the courts'

recognition that any prejudice from closures failing to meet the Waller requirements is inherent. Any such prejudice is impermissible. Harmless error is nonexistent. Therefore, Defendant need not object to a closure failing to meet the Waller requirements to preserve the issue for appellate review. Respondent's probable contrary position overlooks that the prejudice is inherent and the evidence needed to sustain an objection in the public trial context is almost impossible to obtain. Since the prejudice is inherent, a contemporaneous objection precondition for appellate review is insupportable and unworkable.

Despite the Waller Court's rejection of a per se rule on courtroom closures, the Second Circuit has apparently adopted such a rule on courtroom closures during the jury charge. In United States v. Romano, 684 F.2d 1057 (2d Cir. 1982),

cert. denied 459 U.S. 1016; 103 S.Ct. 375, 376, 74 L.Ed.2d 509 (1982), the trial judge closed the courtroom during the jury charge. The judge permitted only individuals already present to remain. After the trial court convicted the defendant, he appealed and claimed a violation of his right to public trial. The Second Circuit upheld the trial judge's order, characterizing it as a "reasonable limitation to ensure that the jury was properly instructed without distraction." Id. at 1065. The court noted that some members of the public were present during the charge and that no one else had tried to enter. Id. at 1065-1066.

The Romano Court's decision and reasoning are flawed. First, the decision predates Waller. Second, the Romano Court did not analyze any factors from pre-Waller decisions to determine if the trial court's order was constitutional,

necessary, or over-restrictive. Third, the Romano Court did not describe how any evidence of anyone trying to enter the courtroom would reach the court record. If court officers bar anyone from entering, how does such an individual express his/her wish to enter to the trial court? Thus, this Court should not follow Romano.

Building on Romano, the Second Circuit opened the possibility that trial courts can evade the Waller requirements and restore per se rules. The means of evasion is to find no closing of the courtroom. In Heering v. Meachum, 11 F.3d 374 (2d Cir. 1993), cert. denied ___ U.S. ___, 114 S.Ct. 1629; 128 L.Ed.2d 353 (1994), the trial judge closed the courtroom during the jury charge. Only those individuals already present could remain. The state trial court convicted the defendant, and the state supreme court denied leave to appeal. Appellant Heering

petitioned the district court for habeas relief based on denial of his right to a public trial, but the court denied the writ.

The Second Circuit affirmed. It distinguished Waller as a case involving total closure (there, the trial court closed a suppression hearing to all persons, except parties, counsel, witnesses, and court officers and officials). The Heering Court reasoned that unlike Waller, individuals had access to the whole trial, including the jury charge, "as long as they arrived before it began." Id. at 380. For individuals arriving late, the trial court made transcripts available. Thus, the Heering Court found no closure implicating Appellant's Sixth Amendment right. Id. The court then found the trial judge's order to be a reasonable manner restriction on courtroom access to prevent jury

distraction during the charge. Id.

This Court should reject Heering for several reasons. First, the Heering Court's no closure conclusion is erroneous, and its implications undercut Waller and the Sixth Amendment right to a public trial. Under Heering, the trial court has broad discretion to evade the Waller test or its slightly less stringent alternative. The trial court need only post an officer or a sign at the door commanding entering individuals to be quiet. The trial court should instruct all spectators to be quiet during the jury charge. The trial court should not have unfettered discretion to enforce sweeping time, place, and manner restrictions constituting the functional equivalent of closure, unless the court complies with Waller. The trial court should not have unfettered discretion to close parts of hearings and trials, including the jury

charge. Instead, the trial court must apply the Waller test. See People v. Micalizzi, 223 Mich. 580, 582, 585; 194 N.W. 540 (1923) ("The defendant by the Constitution ... was guaranteed a trial to which the public was admitted, not part of the public and part of the time,.... If a portion of the trial may be conducted behind barred doors, it may all be conducted behind barred doors. [Our emphasis]). Heering's overbroad discretion to find no closure permits the evasion of Waller's preconditions for restriction of access and resurrection of per se rules. Therefore, this Court should not follow Heering.

Other reasons support this conclusion. As discussed above, excluded individuals did not have any known means of communicating their exclusions on the court record. If an individual sees a "Do Not Enter--Jury Charge in Progress" or

similar sign, that individual will leave. Second, the Heering Court's assumption that providing transcripts adequately substituted for permitting actual attendance ignores Waller's, Gannett's, and Oliver's dicta that individuals' actual presence, not review of transcripts or even newspapers, helps keep trial judges, prosecutors, defense counsel, and others on good behavior and within bounds. Third, the trial judge did not explore other alternatives to closure. Thus, the Court should reject Heering.

During the jury charge, other means to control potential problems besides closure are available. For example, noise from footsteps of individuals entering or leaving the courtroom, spectators' talking and whispering, noise from cooling and heating units may distract the jury. Court officers' requests and warnings can control the first two. Timely repairs can

control the third. Closing the courtroom in response to these potential problems is thus drastic and unnecessary.

Review of recent Michigan appellate decisions on the right to a public trial reveals a glaring contradiction and one decision contrary in part to Waller. In Micalizzi, 223 Mich. 580; 194 N.W. 540 (1923), the Michigan Supreme Court found a right of public trial violation based on closing the courtroom during the jury charge. There, the trial court locked the courtroom during the jury charge, thus excluding one defense attorney and some other individuals. The trial court convicted the defendant of first degree murder and denied his motion for new trial. The Michigan Supreme Court reversed and held that the trial court had violated his right to a public trial. The court reasoned that the record did not show any good reason, like an overcrowded

courtroom, to justify closure. The Micalizzi Court quoted the above Murray passage with approval. Id. at 583-584.

In People v. Bails, 163 Mich. App. 209; 413 N.W.2d 709 (1987), lv. denied 429 Mich. 890 (1987), the Michigan Court of Appeals did not find a violation on facts similar to Micalizzi. In Bails, the trial court locked the courtroom during the jury charge. The stated reason was increased traffic on a sentencing day would distract the jury. The court did not exclude any onlookers already present. Defendant did not object. The trial court convicted the defendant of first degree criminal sexual conduct and denied his motion for new trial.

The Michigan Court of Appeals affirmed. It cited lack of defense objection, the short closure period, and the above stated reason. The Bails Court then distinguished Micalizzi, by stating

that unlike Micalizzi, the trial court did not bar a defense attorney or any other known persons. In dicta, the Bails Court called the defense objection "a pivotal point" in the Waller decision. Id. at 211. In further dicta, the Bails Court stated that it "would not hesitate to apply the harmless error analysis in this situation." Id. at 212.

This Court should reject Bails. On the closure time period, the Micalizzi Court is correct in evaluating its significance: The fact of closure, not its length, is crucial. The Micalizzi Court evaluated the stated reason for closure. The Bails Court failed to do so. It also failed to evaluate less drastic alternatives, thereby ignoring Waller. The Bails Court's distinguishing of Micalizzi overlooks Waller's and other federal courts' rejection of any requirement to show specific prejudice from a closure. If

a defendant need not show prejudice, he need not identify excluded individuals. The Bails Court's reading of Waller on defense objections is incorrect. The Waller Court did not mandate contemporaneous objection and did not base its decision on trial counsel's objection. Finally, the Bails Court's dicta on harmless error contradicts the Waller Court's rejection of harmless error analysis on the right of public trial violations. For these reasons, this Court should reject Bails.

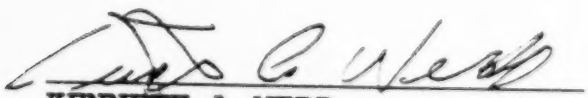
Based on the above review, this Court has good reason to hear this appeal. It involves important issues on the Sixth Amendment right of public trial. State trial courts' closure of the courtroom during the jury charge may well be prevailing practice. This practice does evade Waller's mandate, unless the trial court applies Waller's factors. This

appeal permits the Court to examine the parameters of Waller in a jury charge context.

CONCLUSION

WHEREFORE, Petitioner Darren Scott Cross respectfully requests this Court to issue a Writ of Certiorari and hear his appeal.

Respectfully submitted,



KENNETH A WEBB
Attorney for Petitioner
2855 Coolidge Rd., Ste. 206
Troy, Michigan 48084
(810) 643-0730

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CIVIL ACTION NO. 92-CV-77240-DT

HONORABLE BARBARA K. HACKETT

MEMORANDUM OPINION AND ORDER

I. Introduction and Procedural History

Petitioner Darren Scott Cross is an inmate at the State Prison of Southern Michigan in Jackson, Michigan. He has filed an application for the writ of habeas corpus under 28 U.S.C. § 2254.

In 1986, the State of Michigan charged petitioner with first-degree felony murder and possession of a firearm during the commission or attempt to commit a felony. In 1987, a jury in Recorder's Court for the City of Detroit, Michigan found petitioner guilty of first-degree

felony murder and not guilty of felony firearm. The trial court sentenced petitioner to mandatory life imprisonment.

On direct appeal to the Michigan Court of Appeals, petitioner made the following arguments through counsel:

> I. THE TRIAL COURT ERRED WHEN IT PERMITTED THE PROSECUTION TO BOLSTER ITS CASE THROUGH THE PRIOR CONSISTENT STATEMENTS OF RICARDO SMITH.
>
> II. THE TRIAL COURT ERRED WHEN IT PERMITTED DEFENDANT-APPELLANT'S STATEMENT TO BE READ TO THE JURY AND SUBSEQUENTLY INTRODUCED INTO EVIDENCE WITHOUT PROPER FOUNDATION.
>
> III. THE TRIAL COURT ERRED WHEN IT PRECLUDED DEFENDANT-APPELLANT FROM INTRODUCING EVIDENCE OF A LACK OF PRIOR CRIMINAL RECORD ON HIS PART.
>
> IV. THE DEFENDANT-APPELLANT'S STATEMENT TO POLICE SHOULD HAVE BEEN SUPPRESSED AS THE FRUIT OF AN ILLEGAL ARREST.
>
> V. THE PROSECUTION'S CLOSING ARGUMENT CONSTITUTED REVERSIBLE ERROR.
>
> VI. THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY ON THE CRIME OF ROBBERY ARMED.

VII. THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON AIDING AND ABETTING FELONY MURDER.

The Court of Appeals affirmed the conviction. See People v. Cross, Michigan Court of Appeals No. 101650 (May 17, 1989). Petitioner presented the arguments enumerated above in an application for leave to appeal in the Michigan Supreme Court. In a standard order, the Supreme Court denied petitioner's application for leave to appeal. See People v. Cross, Michigan Supreme Court No. 86990 (February 26, 1990).

Petitioner then filed a motion to set aside the judgment. The trial court denied the motion, and petitioner pursued a second round of appeals. In his brief before the Michigan Court of Appeals, he raised the following questions:

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN REMARKING IN THE PRESENCE OF THE JURY THAT DEFENSE COUNSEL WAS GOING TOO FAR IN HIS OPENING STATEMENT TO THE JURY WHEN COUNSEL STATED

THAT HE BELIEVED 'THAT AT THE END OF THIS CASE * * * THAT A REASONABLE DOUBT WILL EXIST AS TO WHETHER OR NOT DARREN SCOTT IS GUILTY OF THE CRIME OF MURDER IN THE FIRST DEGREE * * * * ?

II. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY DENYING TO THE DEFENDANT HIS RIGHT TO A PUBLIC TRIAL BY STATING "TO THE PERSONS WHO ARE IN THE AUDIENCE, ONCE I START INSTRUCTING THIS JURY NO ONE WILL BE PERMITTED TO GO OUT OF THIS COURTROOM NOR, TO THE OFFICER WHO IS AT THE DOOR, IS ANYONE TO BE ADMITTED. * * * , WHICH RIGHT WAS CREATED BY ART 1, § 20 OF MICH CONST 1963 AND BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS APPLIED TO THE STATE OF MICHIGAN BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHICH RIGHT THE DEFENDANT AT NO TIME WAIVED, AND CONCERNING WHICH RIGHT THE DOCTRINE OF MISCARRIAGE OF JUSTICE HAS NO APPLICATION, AND THE INFRINGEMENT OF WHICH RIGHT IS INHERENTLY PREJUDICIAL WITHOUT ACTUAL PROOF OF INJURY?

III. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN INSTRUCTING THE JURY THAT THE MERE POSSIBILITY OF THE INNOCENCE OF THE DEFENDANT WAS NOT A REASONABLE DOUBT IN THAT THE INSTRUCTION IMPLIEDLY SUGGESTED THAT THEY WOULD HAVE TO FIND THAT THE DEFENDANT WAS INNOCENT IN ORDER TO ACQUIT HIM OF THE CHARGE?

IV. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN INSTRUCTING THE JURY THAT "IF YOU SHOULD CONCLUDE THAT ONE OR MORE OF THE WITNESSES INTENTIONALLY TESTIFIED FALSELY ABOUT ANY FACT WHICH IS NECESSARY FOR YOUR DECISION IN THIS CASE THEN FOR THAT REASON ALONE YOU MAY, IF YOU WISH, DISREGARD EVERYTHING THAT THE WITNESS SAID. YOU MAY HOWEVER BELIEVE THAT THE WITNESS TESTIFIED FALSELY AND INTENTIONALLY IN ONE RESPECT BUT TRUTHFULLY ABOUT OTHER THINGS. IF THAT IS THE SITUATION AS YOU SEE IT THEN YOU MAY ACCEPT THAT PART OF THEIR TESTIMONY WHICH YOU BELIEVE TO BE TRUE AND YOU MAY REJECT THAT PART WHICH YOU BELIEVE TO BE FALSE.

V. ON THE BASIS OF DEFENDANT'S OUT OF COURT STATEMENT TAKEN AND READ BY SGT. PRESLEY IN COURT, WAS DEFENDANT ENTITLED TO A JURY INSTRUCTION THAT THE COURT (SIC) (JURY) COULD FIND THE DEFENDANT NOT GUILTY OF ANY UNLAWFUL HOMICIDE IF THEY FOUND THAT HE FREELY AND COMPLETELY GAVE UP, THAT IS, ABANDONED THE IDEA OF ACTING IN CONCERT WITH CO-DEFENDANT CRAIG PRIOR TO CRAIG'S MURDER OF MR. KYLES?

VI. ON THE BASIS OF DEFENDANT'S OUT OF COURT STATEMENT TAKEN AND READ BY SGT. PRESLEY IN COURT, WAS DEFENDANT ENTITLED TO A JURY INSTRUCTION THAT THE JURY COULD FIND HIM GUILTY ONLY OF BEING AN ACCESSORY AFTER THE FACT IF THEY BELIEVED THE DEFENDANT'S

STATEMENT TO BE TRUE?

VII. DID COUNSEL FOR DEFENDANT CROSS MAKE A SERIOUS MISTAKE WITHIN THE MEANING OF PEOPLE V GARCIA AND DID HE RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WITHIN THE MEANING OF STRICKLAND V WASHINGTON IN FAILING TO REQUEST JURY INSTRUCTIONS: 1) ON THE BASIS OF DEFENDANT'S OUT OF COURT STATEMENT TAKEN AND READ BY SGT. PRESLEY, THAT THE JURY COULD FIND THE DEFENDANT NOT GUILTY OF MURDER IN ANY DEGREE IF THEY FOUND THAT HE FREELY AND COMPLETELY GAVE UP, THAT IS, ABANDONED THE IDEA OF ACTING IN CONCERT WITH CO-DEFENDANT CRAIG PRIOR TO CRAIG'S FIRING OF THE FATAL SHOT; AND, 2) ON THE BASIS OF DEFENDANT'S SAME OUT OF COURT STATEMENT, THAT THE JURY COULD FIND THE DEFENDANT NOT GUILTY OF MURDER IN ANY DEGREE, BUT INSTEAD FIND HIM GUILTY OF BEING AN ACCESSORY AFTER THE FACT?

The Court of Appeals denied petitioner's application for leave to appeal for lack of merit in the grounds presented. See People v. Cross, Michigan Court of Appeals No. 139514 (July 8, 1991). The Michigan Supreme Court denied petitioner's subsequent application for leave to appeal the same issues. See

People v. Cross, Michigan Supreme Court No. 92052 (January 31, 1992).

On December 22, 1992, petitioner filed the pending petition for a writ of habeas corpus through counsel. The issues in the habeas petition are:

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN REMARKING IN THE PRESENCE OF THE JURY THAT DEFENSE COUNSEL WAS GOING TOO FAR IN HIS OPENING STATEMENT TO THE JURY WHEN COUNSEL STATED THAT HE BELIEVED 'THAT AT THE END OF THIS CASE * * * THAT A REASONABLE DOUBT WILL EXIST AS TO WHETHER OR NOT DARREN SCOTT IS GUILTY OF THE CRIME OF MURDER IN THE FIRST DEGREE * * * ?

II. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY DENYING TO THE DEFENDANT HIS RIGHT TO A PUBLIC TRIAL BY STATING 'TO THE PERSONS WHO ARE IN THE AUDIENCE, ONCE I START INSTRUCTING THIS JURY NO ONE WILL BE PERMITTED TO GO OUT OF THIS COURTROOM NOR, TO THE OFFICER WHO IS AT THE DOOR, IS ANYONE TO BE ADMITTED. * * * , WHICH RIGHT WAS CREATED BY ART 1, § 20 OF MICH CONST 1963 AND BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS APPLIED TO THE STATE OF MICHIGAN BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHICH RIGHT THE DEFENDANT AT NO TIME WAIVED, AND CONCERNING

WHICH RIGHT THE DOCTRINE OF MISCARRIAGE OF JUSTICE HAS NO APPLICATION, AND THE INFRINGEMENT OF WHICH RIGHT IS INHERENTLY PREJUDICIAL WITHOUT ACTUAL PROOF OF INJURY?

III. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN INSTRUCTING THE JURY THAT THE MERE POSSIBILITY OF THE INNOCENCE OF THE DEFENDANT WAS NOT A REASONABLE DOUBT IN THAT THE INSTRUCTION IMPLIEDLY SUGGESTED THAT THEY WOULD HAVE TO FIND THAT THE DEFENDANT WAS INNOCENT IN ORDER TO ACQUIT HIM OF THE CHARGE?

IV. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN INSTRUCTING THE JURY THAT 'IF YOU SHOULD CONCLUDE THAT ONE OR MORE OF THE WITNESSES INTENTIONALLY TESTIFIED FALSELY ABOUT ANY FACT WHICH IS NECESSARY FOR YOUR DECISION IN THIS CASE THEN FOR THAT REASON ALONE YOU MAY, IF YOU WISH, DISREGARD EVERYTHING THAT THE WITNESS SAID. YOU MAY HOWEVER BELIEVE THAT THE WITNESS TESTIFIED FALSELY AND INTENTIONALLY IN ONE RESPECT BUT TRUTHFULLY ABOUT OTHER THINGS. IF THAT IS THE SITUATION AS YOU SEE IT THEN YOU MAY ACCEPT THAT PART OF THEIR TESTIMONY WHICH YOU BELIEVE TO BE TRUE AND YOU MAY REJECT THAT PART WHICH YOU BELIEVE TO BE FALSE.

V. ON THE BASIS OF DEFENDANT'S OUT OF COURT STATEMENT TAKEN AND READ BY SGT. PRESLEY IN COURT,

WAS DEFENDANT ENTITLED TO A JURY INSTRUCTION THAT THE COURT (SIC) (JURY) COULD FIND THE DEFENDANT NOT GUILTY OF ANY UNLAWFUL HOMICIDE IF THEY FOUND THAT HE FREELY AND COMPLETELY GAVE UP, THAT IS, ABANDONED THE IDEA OF ACTING IN CONCERT WITH CO-DEFENDANT CRAIG PRIOR TO CRAIG'S MURDER OF MR. KYLES?

VI. ON THE BASIS OF DEFENDANT'S OUT OF COURT STATEMENT TAKEN AND READ BY SGT. PRESLEY IN COURT, WAS DEFENDANT ENTITLED TO A JURY INSTRUCTION THAT THE JURY COULD FIND HIM GUILTY ONLY OF BEING AN ACCESSORY AFTER THE FACT IF THEY BELIEVED THE DEFENDANT'S STATEMENT TO BE TRUE?

VII. DID COUNSEL FOR DEFENDANT CROSS MAKE A SERIOUS MISTAKE WITHIN THE MEANING OF PEOPLE V GARCIA AND RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WITHIN THE MEANING OF STRICKLAND V WASHINGTON IN FAILING TO REQUEST JURY INSTRUCTIONS 1) ON THE BASIS OF DEFENDANT'S OUT OF COURT STATEMENT TAKEN AND READ BY SGT. PRESLEY, THAT THE JURY COULD FIND THE DEFENDANT NOT GUILTY OF MURDER IN ANY DEGREE IF THEY FOUND THAT HE FREELY AND COMPLETELY GAVE UP, THAT IS, ABANDONED THE IDEA OF ACTING IN CONCERT WITH CO-DEFENDANT CRAIG PRIOR TO CRAIG'S FIRING OF THE FATAL SHOT AND 2) ON THE BASIS OF DEFENDANT'S SAME OUT OF COURT STATEMENT, THAT THE JURY COULD FIND THE DEFENDANT NOT GUILTY OF MURDER IN ANY DEGREE, BUT

INSTEAD FIND HIM GUILTY OF BEING AN ACCESSORY AFTER THE FACT?

On July 8, 1993, respondent answered the petition, arguing that the Court should dismiss the petition as a mixed petition of exhausted and unexhausted issues. On August 24, 1993, petitioner replied to respondent's answer to the petition and sought leave to amend the habeas petition. The Court granted petitioner's motion to amend the petition to include the following claims from his brief on direct appeal of his conviction:

I. THE TRIAL COURT ERRED WHEN IT PERMITTED THE PROSECUTION TO BOLSTER ITS CASE THROUGH THE PRIOR CONSISTENT STATEMENTS OF RICARDO SMITH

III. THE TRIAL COURT ERRED WHEN IT PRECLUDED DEFENDANT-APPELLANT FROM INTRODUCING EVIDENCE OF A LACK OF PRIOR CRIMINAL RECORD ON HIS PART

IV. DEFENDANT-APPELLANT'S STATEMENT TO POLICE SHOULD HAVE BEEN SUPPRESSED AS THE FRUIT OF AN ILLEGAL ARREST

Respondent has had an opportunity to

respond to the amended claims, and the case is now ready for adjudication.

II. Discussion

A. Exhaustion of State Remedies

Federal habeas petitioners must fairly present the substance of each federal constitutional claim in the state courts before raising the claim in a federal habeas corpus petition. 28 U.S.C. § 2254(b) and (c); Picard v. Connor, 404 U.S. 270, 275-278 (1971); Manning v. Alexander, 912 F.2d 878, 880-881 (6th Cir. 1990). "A petitioner 'fairly presents' his claim to the state courts by citing a provision of the Constitution, federal decisions using constitutional analysis, or state decisions employing constitutional analysis in similar fact patterns." Levine v. Torvik, 986 F 2d 1506, 1516 (6th Cir.), cert. denied, __U.S.__, 113 S.Ct. 3001 (1993). A prisoner who challenges a

Michigan conviction must raise each issue in the Michigan Court of Appeals and in the Michigan Supreme Court before seeking habeas relief in federal court. See Hafley v. Sowders, 902 F.2d 480, 483 (6th Cir. 1990)(quoting Winegar v. Corrections Department, 435 F. Supp. 285, 289 (W.D. Mich. 1977), aff'd. without opinion, 582 F.2d 1281 (6th Cir. 1978)); Pillette v. Foltz, 824 F.2d 494, 496 (6th Cir. 1987).

Generally, a federal district court must dismiss a habeas petition containing claims that were not exhausted in the state courts. Rose v. Lundy, 455 U.S. 509, 510 (1982); Shoultes v. Laidlaw, 886 F.2d 114, 116-117 (6th Cir. 1989). Dismissal of a "mixed petition" leaves "the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." Rose v. Lundy,

455 U.S. at 510. The exhaustion rule, however, is not a jurisdictional requirement. Castille v. Peoples, 489 U.S. 346, 349 (1989)(citing Granberry v. Greer, 481 U.S. 129 (1987)).

Petitioner raised all his habeas claims in both the Michigan Court of Appeals and in the Michigan Supreme Court. Respondent, however, argues that petitioner failed to raise some of his claims as federal constitutional claims in state court. The Court agrees that petitioner relied solely on state law when presenting certain pending claims in state court. Specifically, petitioner raised the following habeas claims strictly as issues of state law in his state appellate briefs: IV (jury instruction on witness credibility)[1]; V (lack of jury instruction

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[1]To the extent that this claim does not raise a federal constitutional claim, petitioner agrees to withdraw it. See petitioner's Response to Respondent's (continued...)

on the defense of abandonment); VI (lack of jury instruction on accessory after the fact); and supplemental issue I (prior consistent statement of Ricardo Smith).

Petitioner cited federal decisions or brought to mind rights protected by the federal Constitution when presenting his other claims in state court. The habeas petition therefore is a mixed petition of exhausted and unexhausted claims. The Court will not dismiss this mixed petition because the habeas claims are without merit. Prather v. Rees, 822 F.2d 1418, 1422 (6th Cir. 1987); Tillett v. Freeman, 868 F.2d 106, 107 (3rd Cir. 1989). The Court can advance the goals of federal-state comity and judicial efficiency by disposing of this case rather than dismissing it on exhaustion grounds. Prather v. Rees, 822 F.2d at 1422; see

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[1](...continued)
Answer to Petition for Writ of Habeas Corpus at 3.

Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050, 1054 (6th Cir. 1983), cert. denied, 464 U.S. 1071 (1984); Martin v. Solem, 801 F.2d 324, 331 (8th Cir. 1986). Accordingly, the Court will proceed to discuss the substance of petitioner's claims.

B. Petitioner's Substantive Claims

1. Trial Court's Remark on Defense Counsel's Opening Statement

Petitioner's claims that the trial court erred when it told petitioner's trial attorney during his opening statement that he had "gone too far." The trial transcript reads in pertinent part as follows:

> MR. BLANK: Thank you. I believe that at the end of this case when you've heard both sides that a reasonable doubt will exist as to whether or not Darren Scott Cross is guilty of the crime of murder in the first degree based upon that reasonable doubt --

> THE COURT: Counsel, now you are going too far.
>
> MR. BLANK: -- I will ask you to find him not guilty. Thank you. T III at 141.[2]

Petitioner alleges that the trial court erred by refusing to permit defense counsel to state his theory of the case. Petitioner alleges that the trial court harmed him by implying that the opening statement was improper and not to be considered.

A "trial judge is not only the moderator but also the governor of the trial. This role allows the trial judge a good deal of discretion in limiting testimony, requiring attorneys to frame questions properly, and interjecting

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[2]T refers to the transcript of trial consisting of six volumes paginated as follows: I (February 11, 1987) - pages 1 - 259; II (February 12, 1987) - pages 1 - 152; III (February 17, 1987) - pages 1- 226; IV (February 18, 1987) - pages 1 - 252; V (February 19, 1987) - pages 1 - 161; and VI and VII (February 23, 1987, and February 24, 1987) - pages 1 - 157.

himself or herself into the trial."

United States v. Martin, 740 F.2d 1352, 1360 (6th Cir. 1984)(citations omitted).

> 'Unless they amount to constitutional violations, prejudicial comments and conduct by a judge in a criminal trial are not proper subjects for collateral attack on a conviction.' Brinlee v. Crisp, 608 F.2d 839, 853 (10th Cir. 1979), cert. denied, 444 U.S. 1047, 100 S.Ct. 737, 62 L.Ed.2d 733 (1980). In collateral proceedings, the test is 'whether the errors alleged . . . could have rendered [the] trial fundamentally unfair.' Buckelew v. United States, 575 F.2d 515, 518 (5th Cir. 1978). To violate a defendant's right to a fair trial, 'a trial judge's intervention in the conduct of a criminal trial would have to reach a significant extent and be adverse to the defendant to a substantial degree.' Daye v. Attorney General of New York, 712 F.2d 1566, 1572 (2d Cir. 1983), cert. denied, __U.S.__, 104 S.Ct. 723, 79 L.Ed.2d 184 (1984).

McBee v. Grant, 763 F.2d 811, 818 (6th Cir. 1985).

The trial court's comment here was a gentle admonition and an insignificant

incident in a lengthy trial. The trial court's comment did not denigrate counsel's theory and did not prevent defense counsel from claiming in his closing argument that the prosecution had failed to prove the elements of the crimes beyond a reasonable doubt. T VI at 7-20. Furthermore, the trial court itself emphasized in its preliminary and final instructions to the jury that the prosecution had the burden of proving guilt beyond a reasonable doubt. T III at 7-8, VI at 83-84. Moreover, defense counsel specifically declined to have the trial court give a theory of the defense during the court's instructions to the jury. T V at 115. With these considerations in mind, this Court finds that the trial court's comment did not violate petitioner's constitutional right to a fair trial.

2. Right to Public Trial

Before charging the jury in this case, the trial court said: "To the persons who are in the audience, once I start instructing this jury no one will be permitted to go out of this courtroom nor, to the officer who is at the door, is anyone to be admitted." T VI at 81. Petitioner claims that this directive violated his right to a public trial.

The Sixth Amendment to the United States Constitution provides in pertinent part as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district where in the crime shall have been committed. . ." U.S. Const. amend. VI. The right to a public trial is not absolute and "may give way in certain cases to other rights or interest. . . ." Waller v. Georgia, 467 U.S. 39, 45 (1984).

In this case, the trial court did not prohibit people from viewing the trial or listening to the jury instructions. The trial court merely prevented people temporarily from entering and leaving the courtroom. The trial court's motive was to curtail distracting movement during the charge to the jury. T VI at 81. This was the only apparent time that the trial court restricted people from entering the courtroom, and the restriction was in effect only for about thirty (30) to forty (40) minutes. T VI at 81, 110. Petitioner's attorney did not object to the order, and the record does not reflect any instances during which someone was actually prevented from entering the courtroom. This Court concludes that the trial court did not deprive petitioner of a public trial.

3. Instruction on Reasonable Doubt

Petitioner's third claim is that the

trial court erred when it instructed the jury that the mere possibility of his innocence was not a reasonable doubt. Petitioner contends that the instruction implied that the jury had to find him innocent to arrive at a reasonable doubt.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In Re Winship, 397 U.S. 358, 364 (1970). This beyond-a-reasonable-doubt requirement applies to state proceedings. Sullivan v. Louisiana, ___U.S.___, 113 S. Ct. 2078 (1993).

Generally, "errors in instructions to the jury . . . do not involve the deprivation of federal constitutional rights." Gemmel v. Buchkoe, 385 F.2d 338, 340 (6th Cir.)(footnote omitted), cert. denied, 385 U.S. 962 (1966). In a collateral attack on a jury instruction,

the question is whether the ailing instruction so infected the entire trial that the resulting conviction violates due process. Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). The issue is not whether the instruction is undesirable, erroneous, or even universally condemned. Id. (quoting Cupp v. Naughten, 414 U.S. at 146). Petitioner must show there is a reasonable likelihood that the jury applied the challenged jury instruction in a way that violates the Constitution. Estelle v. McGuire, ___U.S. __, 112 S.Ct. 475, 482 and 482 n. 4 (1991). A deficient reasonable-doubt instruction can never be harmless error. Sullivan v. Louisiana, 113 S. Ct. at 2082-2083.

The trial court in this case defined reasonable doubt as follows:

> A reasonable doubt is exactly what it infers. A

> reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence in this case or growing out of any reasonable or legitimate inferences drawn from the evidence or the lack of evidence. It is not merely an imaginary doubt or a flimsy, fanciful doubt, or a doubt based upon the mere possibility of the innocence of the defendant or a doubt based upon sympathy. But rather, it is a fair, honest doubt based upon reason and common sense. It is a state of mind which would cause you to hesitate in making an important decision in your own personal life.
>
> By stating that the prosecution must prove guilt beyond a reasonable doubt I mean that there must be such evidence that causes you to have a firm conviction amounting to a moral certainty of the truth of the charges made against this defendant.

T III at 8, VI at 84.

At the time of petitioner's trial, this instruction was a standard jury instruction under state law. See CJI 3:1:04. The instruction thoroughly defined reasonable doubt. It emphasized the requirement of some rational basis for

a doubt, and it acknowledged that the doubt must be based on evidentiary certainty. Cf. Cage v. Louisiana, 498 U.S. 39, 40-41 (1990).[3] Moreover, the trial court gave the instruction in the context of instructions on the presumption of innocence, the burden of proof, and the requirement of proving every element of the offense. T VI at 83-84. This Court therefore finds there is not a reasonable likelihood that the jury equated a reasonable doubt with finding petitioner innocent. The trial court's definition of reasonable doubt did not violate petitioner's right to due process.

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[3]In Cage, the Supreme Court criticized a jury instruction suggesting that reasonable doubt was (1) "such doubt as would give rise to a grave uncertainty," (2) "an actual substantial doubt," or (3) "a moral certainty." Cage v. Louisiana, 498 U.S. at 40-41. The Supreme Court did not criticize an instruction, somewhat like the one at issue here, that "[a] reasonable doubt is not a mere possible doubt." Id. at 40.

4. Jury Instruction on Credibility of Witnesses

Petitioner's fourth claim is that the trial court erred when instructing the jury on the credibility of witnesses. The trial court's instruction was as follows:

> If you should conclude that one or more of the witnesses intentionally testified falsely about any fact which is necessary for your decision in this case then for that reason alone you may, if you wish, disregard everything that that witness said. You may, however, believe that the witness testified falsely and intentionally in one respect but truthfully about other things. If that is the situation as you see it then you may accept that part of their testimony which you believe to be true and you may reject that part which you believe to be false.

T VI at 91-92. Petitioner alleges that this instruction was inconsistent, confusing, erroneous, and prejudicial. He argues that this instruction permitted jurors to disregard his entire statement to a police officer if they chose not to believe the portion of his statement in

which he denied possessing a gun.

As noted above in footnote 1, petitioner concedes that he may not have exhausted this issue as a federal constitutional claim in state court. To that extent, he has withdrawn this claim.

Petitioner not only failed to exhaust this claim as a federal issue in state court, he has failed to raise it as a federal constitutional issue here. Therefore, even if the alleged error violated state law, this Court may not grant habeas relief.[4] 28 U.S.C. § 2254(a); Estelle v. McGuire, 112 S. Ct. at 481-482; Pulley v. Harris, 465 U.S. 37, 41

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[4]Whether the instruction was erroneous under state law is doubtful. It is in accord with the current standard jury instruction, which cautions jurors that they "do not have to accept or reject everything a witness said," but may "believe all, none, or part of any person's testimony." See CJI2d 3.6. Furthermore, the trial court instructed the jurors that they could accept petitioner's statement or any part thereof as true and give it whatever weight they thought it deserved. T VI at 88.

(1984); O'Neal v. Morris, 3 F.3d 143, 148 (6th Cir. 1993); Wood v. Marshall, 790 F.2d 548, 551 (6th Cir. 1986)(noting that "[a] jury instruction which violates only state law cannot provide a basis for habeas corpus relief."), cert. denied sub nom Wood v. McMackin, 479 U.S. 1036 (1987); Melchior v. Jago, 723 F.2d 486, 491 (6th Cir. 1983), cert. denied, 466 U.S. 952 (1984).

5. Failure to Instruct

The prosecution charged petitioner in this case with first-degree felony murder and felony firearm. T III at 5-6. The charges arose from a robbery of drug dealers Ricardo Smith and Willie Kyles by petitioner and petitioner's co-defendant, Craig Dean. Either petitioner or Craig Dean allegedly shot and killed Willie Kyles during the robbery. Petitioner's fifth and sixth habeas claims are that he was entitled to jury instructions on the

defense of abandonment and on the crime of accessory after the fact. According to petitioner, his statement to Sergeant Presley justified these instructions. Petitioner argues that he may have been acquitted if the trial court had given these instructions.

A "judge must instruct the jury on the law relevant to the specific charges." Browning v. Foltz, 837 F.2d 276, 280 (6th Cir. 1988), cert. denied, 488 U.S. 1018 (1989). To establish abandonment as a defense, a defendant has the burden of proving that he gave up the idea of committing a crime. See CJI2d 9.4. If the defendant gave up the idea of committing the crime because of unexpected problems, he did not abandon the crime of his own free will. Id.

An accessory after the fact is one who knowingly helps a felon to avoid detection, arrest, trial or punishment.

People v. Karst, 118 Mich. App. 34, 39-40 (1982)(Quoting People v. Lucas, 402 Mich. 302, 304 (1978)); CJI2d 8.6. It is a distinct crime that must be included as a charge in the criminal information. People v. Williams, 412 Mich. 711 (1982); People v. Karst, 118 Mich. App. at 41.

Petitioner did not testify at trial. Sergeant William Presley, who arrested petitioner, testified about petitioner's statement to him following petitioner's arrest. In his statement, petitioner said the following. While talking with Craig Dean at his sister's house on Corbett Street, Dean had told him about "a guy named Ricardo," who was selling "dope" on Wade Street. T IV at 244. Craig Dean also told him about a man named Peanut who owed him money. T IV at 244. Craig Dean expressed his intent to rob Peanut to obtain the money owed him. T IV at 244. He (petitioner) and Craig Dean went to the

house on Wade Street about 2:00 a.m. on September 6, 1986. T IV at 244. Ricardo Smith was at the house. When Craig Dean inquired about Peanut's whereabouts, Ricardo Smith suggested that they return about 6:00 or 7:00 a.m. T IV at 245. After he (petitioner) and Craig Dean left the house on Wade Street, Craig Dean said they had to do something because Ricardo Smith might warn Peanut about them. T IV at 245. Consequently, they returned to the house on Wade Street about 4:00 or 4:15 a.m. T IV at 245.

Petitioner admitted in his statement that he had had a gun at that time. T IV at 245. However, when Sergeant Presley asked for a description of the gun, petitioner denied having had a gun and said that Craig Dean had had it. T IV at 245.

Petitioner's statement continued as follows. He (petitioner), Craig Dean,

Ricardo Smith, and another man went upstairs at the Wade Street address. Craig Dean then pulled a gun and said to Ricardo Smith, "This is it." T IV at 246. The four of them subsequently went downstairs. T IV at 246. Craig Dean had the gun on them and asked Ricardo Smith about the location of the money and "stuff." T IV at 246. He (petitioner) picked up $30.00 and two bags of crack cocaine from the floor. T IV at 246-247. Ricardo Smith then ran towards the back of the house and he (petitioner) ran out the front door of the house. T IV at 247. He (petitioner) subsequently heard one gun shot followed by two more gunshots a second later. T IV at 247. He ran back to the house on Corbett Street. Craig Dean arrived there about thirty-five (35) to forty (40) seconds later. T IV at 247. He (petitioner) had two bags, and Craig Dean had one bag and $30.00. T IV at 247.

They divided the money and crack cocaine. T IV at 247. Craig Dean had told him when they went to the house that he would give him (petitioner) some money because he (petitioner) only wanted money, not the crack cocaine. T IV at 248. He (petitioner) flushed his cocaine down a toilet and threw the gun away. T IV at 247.

At trial, petitioner's attorney did not request an instruction on the defense of abandonment, and he did not seek to amend the information to include a charge of accessory after the fact. Furthermore, Ricardo Smith testified as follows. On September 6, 1986, he and Willie Kyles were working together selling crack cocaine. T IV at 17-18. He saw petitioner and Craig Dean at the Wade Street address about 6:00 a.m. that day. T IV at 23. Craig Dean knocked on the door, went up to the second floor, and

asked about Dee (petitioner). T IV at 23, 25, 29. He (Ricardo Smith) looked out the window and said that petitioner was downstairs on the front porch. (T IV at 25. At Craig Dean's request, Willie Kyles admitted petitioner into the house. T IV at 26. Petitioner went upstairs, pulled out a pistol, and said, "You know what time it is." T IV at 26-27, 29. This meant, "[I've] come to stick [you] up; give me all the drugs you got, all the money, and everything." T IV at 27. Petitioner then said, "Where's the stuff?" T IV at 29. When he (Ricardo Smith) threw crack cocaine on the floor, Craig Dean picked it up and put it in his pocket. T IV at 33-34. Craig Dean asked for the keys to the gate, and the four of them proceeded to go downstairs. T IV at 35-36. The only exposed weapon was still in petitioner's hand. T IV at 36.

Craig Dean then asked for "the rest

of the stuff" and picked up some things that had been pointed out to him. T IV at 38. Both petitioner and Craig Dean told Willie Kyles that they would kill him if they found anything else. T IV at 39. At Willie Kyles' command to "give him the rest of the stuff," he (Ricardo Smith) pulled out two sacks of cocaine and gave them to Craig Dean. T IV at 39-40. Petitioner still had the gun then. T IV at 40.

Craig Dean then left the premises, but petitioner, Willie Kyles, and himself (Ricardo Smith) remained in the living room. T IV at 41. At that point, petitioner told him and Willie Kyles to lie on the floor. T IV at 41. Willie Kyles sat on the floor, but he (Ricardo Smith) refused to do so. T IV at 41. Petitioner said, "You're hesitating, go on ahead and lay down so I can take care of my business . . . and leave town." T IV

at 43. He (Ricardo Smith) then ran through the dining room and bedroom and jumped out a window. T IV at 43. He thought that petitioner shot at him while he ran. T IV at 44. When he reached the end of the driveway, he heard two more shots. T IV at 45-46.

Thus, Ricardo Smith's testimony clearly established petitioner as a principal in the felony murder, not a mere accessory after the fact and definitely not someone who abandoned a criminal attempt. Petitioner's own statement to Sergeant Presley indicated that petitioner was not a mere accessory after the fact, but an aider and abettor in the crimes. He admitted that he participated in the robbery. Although he claimed to have left the crime scene before the gunshots were fired, he admitted that he was still a participant when Craig Dean allegedly threatened Ricardo Smith and Willie Kyles

with a gun. Petitioner also admitted in his statement that he took crack cocaine with him before leaving the crime scene. Therefore, neither Ricardo Smith nor petitioner's rendition of the facts justified instructions on the defense of abandonment or on the offense of accessory after the fact.

Furthermore, the trial court instructed the jury on the elements of the crimes and on aiding and abetting. These instructions informed the jurors of the necessity of finding the requisite intent and participation before they could convict.

Finally, although the trial court instructed the jury on first-degree felony murder, second-degree murder, and armed robbery, the jury found petitioner guilty of the most severe charge (first-degree felony murder). It is not likely that a jury, which found a person guilty of

felony murder rather than the lesser charges of second-degree murder or armed robbery would have been swayed by a defense of abandonment. Similarly, it is unlikely that the jury would have found petitioner guilty as an accessory after the fact if he had been so charged. Therefore, even if the trial court erred by failing to give the desired instructions, the error was harmless. See Brecht v. Abrahamson, __U.S.__, 113 S.Ct. 1710 (1993); O'Neal v. Morris, 3 F.3d 143, 145 & 145 n.1 (6th Cir. 1993).

6. Assistance of Trial Counsel

Petitioner's next claim is that his trial attorney was ineffective for failing to request jury instructions on abandonment and accessory after the fact. To prevail on this claim, petitioner must show first

> that counsel's performance was deficient. This requires showing that counsel made errors

> so serious that counsel was not functioning as the 'counsel' guaranteed [petitioner] by the Sixth Amendment. Second, [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive [petitioner] of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). The standard of performance is reasonably effective assistance under prevailing professional norms. Id. at 687-688. The Court will not question matters involving trial strategy and must presume that counsel rendered adequate assistance. Id. at 689-690; United States v. Chambers, 944 F.2d 1253, 1272 (6th Cir. 1991), cert. denied, __U.S.__, 112 S.Ct. 1217 (1992), and cert. denied sub nom Lucas v. United States, ___U.S.___, 112 S.Ct. 1680 (1992). To demonstrate prejudice, petitioner must show "that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." Strickland v. Washington, 466 U.S. at 694.

The Court finds that defense counsel's performance was not deficient for failing to request the desired instructions. As noted in the previous section, Ricardo Smith's testimony suggested that petitioner was a principal in the criminal enterprise. Petitioner's own statement placed him at the scene of the crime and suggested that he aided and abetted Craig Dean. Depending on which rendition of the facts the jury chose to believe, it was clear that petitioner's role in the offense was either as a principal or as an aider and abettor. The evidence therefore did not warrant instructions on the defense of abandonment or on the crime of accessory after the fact.

Given the strength of the evidence against petitioner, it is unlikely that

the outcome of the trial would have been different had counsel requested instructions on abandonment or accessory after the fact. Petitioner has not demonstrated that his attorney "was so manifestly ineffective that defeat was snatched from the hands of probable victory." United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992), cert. denied, __U.S.__, 113 S.Ct. 2969 (1993). To conclude, defense counsel's performance was neither deficient nor prejudicial.

7. Evidentiary Issues

Petitioner's next two claims concern evidentiary issues. He alleges first that the trial court erred when it permitted the prosecution to elicit testimony from Ricardo Smith concerning Smith's prior consistent statements. The attempted rehabilitation occurred after defense counsel impeached Ricardo Smith about whether he was surprised when the

defendants appeared at 12546 Wade Street early on September 6, 1986, and about who opened the gate to the first floor. Petitioner claims that the subjects on which the prosecutor suggested that Ricardo Smith had made consistent statements should have been limited to topics on which defense counsel had actually impeached Ricardo Smith. Petitioner's second evidentiary claim is that the trial court erred when it precluded him from introducing evidence of his lack of a prior criminal record.

Generally, trial court errors on state procedure and evidentiary issues do not rise to the level of federal constitutional claims cognizable in a habeas petition. Waters v Kassulke, 916 F.2d 329, 335 (6th Cir. 1990)(citations omitted); Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir. 1988); Krist v. Foltz, 804 F.2d 944, 947 (6th Cir. 1986). To prevail

on his claims of state court evidentiary errors, petitioner must show that the result was so fundamentally unfair as to deprive him of his federal constitutional right to due process. Id.

a. Rehabilitation of Prosecution's Key Witness

The Michigan Court of Appeals reviewed petitioner's first evidentiary claim on direct appeal and concluded that the prosecutor improperly rehabilitated Ricardo Smith with evidence of his prior consistent statements. The Court of Appeals, nevertheless, found that the error was harmless.

Despite the apparent error in the trial concerning rehabilitation, this Court generally may not grant the writ of habeas corpus on the basis of a state court error. Pulley v. Harris, 465 U.S. at 41; Smith v. Phillips, 455 U.S. 209, 221 (1982). An exception exists when the error rises to the level of depriving the

petitioner of fundamental fairness in the trial. Serra v. Michigan Department of Corrections, 4 F.3d 1348, 1354 (6th Cir. 1993).

Ricardo Smith was the key witness at trial, and his credibility was an important factor for the prosecution. It is unlikely, however, that the jury was swayed solely by evidence that Ricardo Smith made prior consistent statements. As the Court of Appeals acknowledged, Ricardo Smith remained impeached on other portions of his testimony. See People v. Cross, Michigan Court of Appeals No. 101650 at 3-4. Additionally, the prosecution elicited information from Ricardo Smith about his involvement in selling crack cocaine, and petitioner's attorney elicited information from Smith concerning his criminal record. T IV at 18, 50-51.

With this portrait of Ricardo Smith

before the jury, the trial court's evidentiary error could not have had a substantial and injurious effect on the jury's verdict. Brecht v. Abrahamson, __ U.S.__, 113 S.Ct. 1710, 1722 (1993). The error was harmless.

b. Admissibility of Lack of Criminal Record

The Court of Appeals opined on direct appeal that evidence of good character is admissible to establish that a defendant acted accordingly. The Court of Appeals concluded, however, that a police officer's testimony about a criminal defendant's lack of a criminal record is not character evidence. This Court is bound by the Court of Appeals decision that the trial court's ruling on this issue was correct under state law. See Missouri v. Hunter, 459 U.S. 359, 368 (1983); Mullaney v. Wilbur, 421 U.S. 684, 691 (1975); Smith v. Sowders, 848 F.2d 735, 739 (6th Cir.), cert. denied, 488

U.S. 866 (1988).

Even if the trial court committed an error concerning admission of petitioner's lack of a criminal record, it is unlikely that the jury would have acquitted petitioner based on that knowledge. Therefore, the alleged error was harmless. No fundamental unfairness resulted from the trial court's refusal to permit petitioner to elicit testimony from Sergeant Presley concerning his lack of a criminal record.

8. Admission of Petitioner's Statement into Evidence

Petitioner's final claim is that the trial court should have suppressed his statement to Sergeant Presley as the fruit of an illegal arrest. Petitioner contends that Sergeant Presley did not have probable cause to arrest him and that his arrest was illegal. Consequently, he argues, his statement to Sergeant Presley should have been suppressed as "fruit of

the poisonous tree."

Federal courts will not review a Fourth Amendment claim in a habeas petition if the petitioner had "an opportunity for full and fair litigation" of the claim in state court. Cardwell v. Taylor, 461 U.S. 571, 572 (1983); Stone v. Powell, 428 U.S. 465, 482 (1976). The applicable test when determining whether a petitioner received an "opportunity for full and fair litigation" of a Fourth Amendment claim is two-pronged. First, the Court must determine whether the state has a procedural mechanism that presents an opportunity to raise the issue. Second the Court must determine whether presentation of the claim was frustrated by a failure of that mechanism. Riley v. Gray, 674 F.2d 522, 526 (6th Cir.), cert. denied sub nom Shoemaker v. Riley, 459 U.S. 948 (1982). In Michigan, a defendant who challenges the legality of a search,

seizure, and arrest may move to suppress evidence before trial, during trial, or even on appeal. People v. Harris, 95 Mich. App. 507 (1980); People v. Ferguson, 376 Mich. 90 (1965).

Before trial in this case, petitioner moved to suppress his statement. The trial court held an evidentiary hearing, but denied the motion. See transcript of motions and Walker[5] hearing. Despite petitioner's continuing objection at trial, the trial court permitted the prosecution to admit petitioner's statement in evidence. T IV at 241.

On direct appeal, petitioner raised the issue again. The Court of Appeals considered the claim and concluded that the evidence was sufficient to justify petitioner's arrest.

Petitioner therefore had a full and

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[5]See People v. Walker, 375 Mich. 331 (1965).

fair opportunity to raise this issue in the trial court and in the Michigan Court of Appeals. Nothing frustrated his presentation of the claim through the state court mechanism. This Court, therefore, will not review petitioner's Fourth Amendment claim.

III. Conclusion

For the reasons given above, the Court concludes that petitioner's claims have no merit or are not cognizable here. Accordingly, the Court DENIES the petition for writ of habeas corpus.

s/Barbara K. Hackett
BARBARA K. HACKETT
UNITED STATES DISTRICT JUDGE

DATED: January 13, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DARREN SCOTT CROSS,

Petitioner,

v.

JOHN JABE,

Respondent.
_____/

CIVIL ACTION NO. 92-CV-77240-DT

HONORABLE BARBARA K. HACKETT

JUDGMENT

The above entitled matter having come before the Court on a Petition for the Writ of Habeas Corpus, Honorable BARBARA K. HACKETT, a United States District Judge, presiding, and in accordance with the Memorandum Opinion and Order entered on January 13, 1994.

IT IS ORDERED AND ADJUDGED that the Petition for a Writ of Habeas Corpus is DENIED.

Dated at Detroit, Michigan on the 13th day of January, 1994.

JOHN P. MAYER
CLERK OF THE COURT

BY: s/Lillian Brook
DEPUTY CLERK

APPROVED:

s/Barbara K. Hackett
BARBARA K. HACKETT
UNITED STATES DISTRICT JUDGE

Case No. 94-1075

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

DARREN SCOTT CROSS,

Petitioner-Appellant,

v.

JOHN JABE,

Defendant-Appellee.

BEFORE: MERRITT, KEITH and BOGGS;
Circuit Judges.

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

It is ORDERED that the judgment of the district court be, and it hereby is, affirmed upon the opinion of the district court.

ENTERED BY ORDER OF THE COURT

s/Leonard Green/bc
Leonard Green, Clerk

FILED: Dec 08 1994, LEONARD GREEN, Clerk
NOT RECOMMENDED FOR FULL-TEXT PUBLICATION